INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	4
Conclusion	7

CITATIONS

Cases:

Dugan v. *Rank*, 372 U.S. 609	5
Hawaii v. *Gordon*, 373 U.S. 57	4, 5
Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682	5
Malone v. *Bowdoin*, 369 U.S. 643	5
Switzerland Co. v. *North Carolina State Highway and Public Works Commission*, 216 N.C. 450, 5 S.E. 2d 327	3
Switzerland Company v. *Udall*, 225 F. Supp. 812	1, 6
Switzerland Company v. *Udall*, 337 F. 2d 56	1, 6

Statutes:

Act of August 25, 1916, c. 408, § 1, 39 Stat. 535, as amended, 16 U.S.C. 1	5
National Industrial Recovery Act, 48 Stat. 195	5
Act of June 16, 1936, § 5, 49 Stat. 1519	5
Act of June 30, 1936, 49 Stat. 2041, as amended, 16 U.S.C. 460a–2	2
Act of August 9, 1937, 50 Stat. 564	5
Act of June 8, 1940, 54 Stat. 250, 16 U.S.C. 460a–3	5
16 U.S.C. 460a–1—460a–4	3

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 787

SWITZERLAND COMPANY AND JOSEPH H. WALKER,
PETITIONERS

v.

STEWART L. UDALL, CONRAD WIRTH AND
SAM P. WEEMS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court is reported at 225 F. Supp. 812. The opinion of the court of appeals is reported at 337 F. 2d 56.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1964. The petition for a writ of certiorari was filed on December 28, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a suit against federal officials to establish a right of access to a federal parkway is a suit against the United States.

2. Whether findings of the district court that access roads belonged to the United States are supported by the evidence.

STATEMENT

The Switzerland Company owns land abutting both sides of the Blue Ridge Parkway and Joseph H. Walker owns land, south of the Parkway, that belonged to Switzerland until 1957. The Parkway right of way is approximately 200 feet wide as it runs through and past Switzerland's land and near Walker's land. The Parkway has a paved two-lane highway in the center and various access roads that run from the highway to the edge of the Parkway's right of way and connect with public or private roads. This controversy involves respondents' action in closing two of those access roads.

The United States and certain States initiated the Blue Ridge Parkway to provide a limited-access scenic highway connecting the Shenandoah National Park in Virginia and the Great Smoky Mountain National Park in North Carolina and Tennessee. The right of way necessary for the Parkway was acquired by the States involved, was then donated to the United States, and is administered by the National Park Service. See Act of June 30, 1936, 49 Stat. 2041, as amended, 16 U.S.C. 460a–2. The North Carolina State Highway and Public Works Commission was authorized to acquire by purchase

or condemnation land within the State for conveyance to the United States for construction of federal parkways, and it condemned unencumbered fee simple title to the area here in dispute (Gov. App. 31–33).[1] By deed dated March 4, 1938, North Carolina conveyed all of the property thus acquired in this area to the United States[2] (P. App. 27). Since the conveyance, the United States has claimed title to, administered, and maintained all land within the boundaries of the Parkway except for certain public roads specifically set out in a cooperative agreement for retention and maintenance by the State Commission (Gov. App. 41–42; P. App. 31). See 16 U.S.C. 460a–1 to 460a–4.

Petitions were filed by Switzerland in the present action on April 3, 1963, alleging that respondents, the Secretary of ~~Labor~~ Interior, the Director of the National Park Service, and the Superintendent of the Blue Ridge Parkway, were acting individually, under color of office but in excess of their authority, in having the two access roads closed. Petitioners contended that the two access roads were reserved by North Carolina in the cooperative agreement, and cannot be closed

[1] "Gov. App." and "P. App." refer, respectively, to the appendices of respondents and petitioners to their briefs in the court of appeals.

[2] In accordance with the North Carolina statutes authorizing the acquisition, Switzerland Company, in 1938, filed a petition in the State court alleging $50,000 in losses and damages because of the taking (Pet. 9). Switzerland was awarded $25,000 as just compensation, and the Supreme Court of North Carolina upheld the award. *Switzerland Co.* v. *North Carolina State Highway and Public Works Commission*, 216 N.C. 450, 5 S.E. 2d 327, 329.

by the United States. Petitioners requested an injunction requiring respondents to remove obstructions placed across the roads, to restore the roads to their original condition, and to forbid them from ever interfering with any of petitioners' accesses to the Parkway (P. App. 12–13).

The district court dismissed the action on the ground that it was an unconsented suit against the United States and that the access roads in question are not public roads of the State of North Carolina (P. App. 37–41). On appeal, the Court of Appeals for the Fourth Circuit affirmed on the ground that respondents were acting within the scope of their authority in closing the access roads, and thus were protected by sovereign immunity.

ARGUMENT

The decision of the court of appeals is plainly correct and is not in conflict with the controlling decisions of this Court. Accordingly, there is no occasion for further review.

1. In *Hawaii* v. *Gordon*, 373 U.S. 57, 58, this Court held that "relief sought nominally against an officer is in fact against the sovereign if the decree would operate against the latter." Here, petitioners request an injunction requiring respondents to remove the barriers placed across the access roads and to restore the roads to their original condition, and restraining them from interfering with the access roads in question or any other access of petitioners to the Parkway (P. App. 13). Obviously, respondents as private citizens would have no authority to go on the Parkway

and remove these barriers, nor could they as private citizens restore these roads to their original condition. All of these things would have to be done by the Parkway officials in their capacity as government officers. For the same reason, an injunction against them as private citizens would have no effect upon the United States' assertion of control over access roads. The suit clearly therefore seeks to operate against the United States through its officers.

Such a suit is barred by sovereign immunity unless it comes within one of two exceptions. Under the decisions in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 686–703, *Malone* v. *Bowdoin*, 369 U.S. 643, 647–648, *Dugan* v. *Rank*, 372 U.S. 609, 619–623, and *Hawaii* v. *Gordon*, 373 U.S. 57, equitable relief may be maintained against a government agent as an individual, without joining the sovereign, if (1) the statute that authorized the agent's conduct is unconstitutional, or (2) the agent's conduct is beyond the scope of his statutory authority.

There was no suggestion that the statutes defining respondents' authority are unconstitutional, or that access to the Parkway—which has been authorized by Congress and placed under the National Park Service of the Department of the Interior[3]—is not within respondents' statutory authority. Petitioners' argument is based upon the theory that these access

[3] National Industrial Recovery Act, 48 Stat. 195, 200–202; Act of June 16, 1936, § 5, 49 Stat. 1519, 1520; Act of August 9, 1937, 50 Stat. 564, 608; Act of June 30, 1936, 49 Stat. 2041, as amended, 16 U.S.C. 460a–2; Act of June 8, 1940, 54 Stat. 250, 16 U.S.C. 460a–3; Act of August 25, 1916, § 1, 39 Stat. 535, as amended, 16 U.S.C. 1.

roads were not the property of the United States, but of North Carolina, and that respondents have no authority to act as to property not owned by the United States. But the very point of sovereign immunity is that the federal claim cannot be adjudicated in an injunction suit against federal agents. As the court of appeals held, whether respondents' "determination of [petitioners'] rights was correct or erroneous and their acts lawful or tortious, they did not depart from their delegated authority * * *." 337 F. 2d at 61.[4]

2. Petitioners' contention is also erroneous on the merits. After a full trial, the district court made extensive findings of fact (225 F. Supp. 812, 813–819), and concluded that the two access roads belonged to the United States and were not public roads retained by North Carolina in the cooperative agreement with the United States (225 F. Supp. at 821). Since North Carolina condemned, in fee, all of the property in question here and conveyed all of that property to the United States, in fee, except the public roads set out in the cooperative agreement, neither petitioners nor the State retained any right of access to the Parkway.

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[4] If petitioners have any right to have these access roads kept open, their cause of action is for just compensation under the Tucker Act. For, contrary to petitioners' suggestion (Pet. 16–17), even if respondents acted wrongfully in closing the roads, they were acting in their official capacity for the United States and therefore the United States would be liable. Cf. *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 693. However, it appears that respondents, assuming that the roads belonged to the State and that they had no right to close the access roads, have taken the State's property and not that of petitioners. In addition, there may be other defenses barring any suit by petitioners for compensation.

CONCLUSION

For the reasons stated, we respectfully submit that the petition for a writ of certiorari should be denied.

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